It is difficult today to draw lines based on network technology and will continue to be so as networks continue to evolve. If the FCC were to adopt the RBOCs' theory -- that some network functions can be denied to competitors -- then the FCC and the state commissions are destined to be embroiled in line-drawing battles, as the RBOCs continue to try to fence more and more of their network capability off from competitors. The LCI proposal, which allows the retail affiliate (ServeCo) free rein to invest in facilities and to deny them to competitors, while imposing the Act's Section 251(c) obligations only on NetCo, creates a bright line that is easy to police, yet gives the RBOC the freedom it claims it needs to invest in new technology that is unavailable to competitors. It also anticipates the regulatory issues that are likely to persist long after interLATA entry occurs -- of which the RBOC petitions are a good example.

The RBOCs also argue that the rates for UNEs (which they consider to be unreasonably low) effectively force them to bear all the risk associated with new facilities, but not garner the benefits of those risky investments. 9/ But this argument does not concern *whether* Section 251(c)(3) the Act should be implemented with respect to any given network element, but rather what the proper rate levels should be. Even under the now-vacated FCC pricing rules, so vilified (and misunderstood) by the RBOCs, it is clear that the Total Element Long-Run Incremental Cost ("TELRIC") methodology *requires* state commissions to allow

9/ *See, e.g.*, Bell Atlantic Petition at 17 & Att. 2 at 15-16; US West Petition at 46-47; Ameritech Petition at 22-23.

ILECs to recover a *risk-adjusted* rate of return, particularly in connection with network elements that are risky to provision. 10/ In other words, if a particular network element involves unusual investment risks, the TELRIC-based rate would give the ILEC extra compensation for taking that risk. 11/

It is ironic that the RBOCs make such a passionate case for needing extra incentives to make the enormous investment and risk involved in investing in advanced technology. They totally ignore the plight of the CLECs, who today possess tiny shares of the local market. Even if they grow quickly, they cannot hope to have the volumes to justify the kind of network upgrades that the RBOCs are contemplating. US West's own statistics prove this out. US West argues that because it serves many less densely populated areas, and thus has lower volumes of customers per switch, that it needs special incentives to invest in xDSL technology to serve those customers. 12/ Clearly, if it is hard for US West to justify investing in adding xDSL for each switch (when it does not even need to collocate to do so!),

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10/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15849, 15850-51, 15854-56, ¶¶ 686, 691, 699-703 (1996), *vacated in pertinent part sub nom. Iowa Util. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997).

11/ The RBOCs' argument that competitors would be able to pay unreasonably low rates for advanced network capabilities and services is even less plausible in the context of resale under Section 251(c)(4). The rate at which an ILEC must offer services for resale to CLECs is based on the ILEC's own retail price -- so if the ILEC has set a supra-competitive retail price for a risky new service, the price resellers will pay will be based on that higher retail price. What the RBOCs appear to wish to do is create a situation in which they alone will be able to offer broadband services -- hardly an environment conducive to competition or innovation.

12/ US West Petition at 25-26.

and when it has the entire local customer base over which to spread the cost of that technology, imagine how difficult it would be for each of US West's competitors to justify that investment:

> [D]eploying xDSL to a central office requires enormous capital investments: US West must install one or more DSLAMs in each central office, prepare the loops of each MegaBit Service subscriber, and cable the office to a network of ATM switching systems. 13/

US West also observes that

> The central office equipment used to provide MegaBit service is expensive: a basic, 128-user DSLAM costs approximately $73,000 installed (and several might be necessary), an installed ATM switching system costs approximately $350,000, and the DS-3 networking needed to connect the central office with other central offices can cost several hundred thousand dollars. . . . 14/

US West also correctly identifies residential and small business customers as the most vulnerable to being left out because of the relatively higher cost of serving them. 15/ With all this, it is genuinely puzzling why an RBOC would not conclude that the best way to recover this investment is to make it available to *all* carriers, thus maximizing volume.

In sum, if the RBOCs are allowed to deny competitors the ability to employ the "features, functions, and capabilities" of xDSL technology, or other new technologies (for this is the precedent for more to come), they would have the

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13/ US West Petition at 35.

14/ *Id.* at 31-32.

15/ *Id.* at 26.

opportunity to reinforce their existing dominance over the incumbent local exchange network. In this way, a RBOC could use its control over the xDSL-based technology to obtain dominance over other packet-based data transport markets. Their exclusive ability to offer broadband and other advanced services would give them leverage into the market for other services as well, since most services will be offered together as "full-service packages."

IV. THE COMMISSION LACKS THE LEGAL AUTHORITY TO GRANT THE PETITIONS.

LCI will not dwell on the many obvious legal infirmities of the petitions. We assume that other parties will focus on these issues. But it is clear that the Commission lacks the legal authority to grant the petitions.

First, Section 706 is not an independent grant of forbearance authority. Rather, it merely directs the Commission to use the forbearance authority that is specifically granted in Sections 10 and 332 in order to promote deployment of advanced services. This is clear from the context: for example, Section 706 also directs the Commission to use price caps toward the same end, even though the FCC's authority to adopt price cap regulation for interstate telecommunications service was well-settled when the 1996 Act was enacted. *National Rural Telecom Assn v. FCC*, 988 F.2d 174 (D.C. Cir. 1993).

Moreover, unlike the detailed standards governing the specific forbearance authority provided in Sections 10 and 332, Section 706 of the Act contains no substantive standards governing when forbearance would be required or permitted. 16/ Congress clearly expressed its intent in Section 10(d) that the Commission may not forbear on enforcing Sections 251(c) and 271 until those sections are fully implemented. When it does consider whether to forbear from such key pro-competitive provisions, it must evaluate the state of the market at the time the request for forbearance is made, and make all the factual and policy determinations required by Section 10.

There also is no basis for the FCC to allow the RBOCs into the interLATA business before they have met the requirements of Section 271. Congress made it clear that regardless of the nature of the interLATA services, the RBOCs must meet certain requirements before being allowed to provide them. The fact that RBOCs cannot offer these services today reflects a considered and balanced policy choice that is at the heart of the 1996 Act: RBOC entry into interLATA markets should be contingent on full opening of local markets in order to give the RBOCs a powerful incentive to open their local networks to competitors. The wisdom of that choice applies with equal force to the interLATA services described in the petitions under consideration here. The construction of interLATA networks for data purposes is still construction of interLATA networks. Nor does Section 3(25) of the Act authorize the FCC to, in effect, repeal Section 271 as to certain classes of interLATA offerings by "redrawing" (that is, *erasing*) LATA boundaries. The Commission needs to hold tight to the carrot of interLATA entry if it is to see the benefits of the Act realized. If the RBOCs are anxious to be rid of the

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16/ 47 U.S.C. § § 160(a), 332, 157n.

interLATA entry restriction, they should elect to pursue the LCI "Fast Track" approach, discussed above.

Likewise, Section 251(c)(3) of the Act does not contemplate that the Commission will freeze the RBOC network in time, allowing the RBOCs to deny access to the network simply because it evolves with technological change. Instead, that section gives requesting access to all the "features, functions, and capabilities" of the network. 47 U.S.C.§ 153(29). Indeed, Congress understood that telecommunications networks are dynamic and fast-changing, and that many different technologies can be used to provide the same services. If Congress had intended to draw lines around services or network facilities or technologies, it would have done so. 17/

In sum, the RBOCs' proposed end run around the Act's statutory framework should not be countenanced.

17/ See, e.g. 47 U.S.C. § 271(c)(1)(a) (providing that local exchange services provided over Part 22 wireless networks did not count under Track A of Section 271).

CONCLUSION

For the foregoing reasons, LCI submits that the petitions of Bell Atlantic, US West, and Ameritech should be denied. The Commission should offer the LCI "Fast Track" plan as an option to RBOCs that want to shield new technology investment from competitors and enjoy the benefits of deregulation. The LCI plan allows this without sacrificing the procompetitive goals of the Act.

Respectfully submitted,

LCI INTERNATIONAL TELECOM CORP.

By: ______________________

Peter A. Rohrbach
Linda L. Oliver
David L. Sieradzki
HOGAN & HARTSON L.L.P.
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Its Attorneys

Anne K. Bingaman
Douglas W. Kinkoph
LCI INTERNATIONAL
TELECOM CORP.
8180 Greensboro Drive, Suite 800
McLean, VA 22102

Dated: April 6, 1998

CERTIFICATE OF SERVICE

I, Rebecca G. Wahl, hereby certify that on this 6th day of April, 1998, a copy of the Comments of LCI International Telecom Corp., was hand delivered to the parties listed below.

Rebecca G. Wahl

Rebecca G. Wahl

William E. Kennard, Chairman
Federal Communications Commission
1919 M St., N.W., Room 814
Washington, D.C. 20554

Susan Ness, Commissioner
Federal Communications Commission
1919 M St., N.W., Room 832
Washington, D.C. 20554

Harold Furchtgott-Roth, Commissioner
Federal Communications Commission
1919 M St., N.W., Room 802
Washington, D.C. 20554

Michael K. Powell, Commissioner
Federal Communications Commission
1919 M St., N.W., Room 844
Washington, D.C. 20554

Gloria Tristani, Commissioner
Federal Communications Commission
1919 M St., N.W., Room 826
Washington, D.C. 20554

John Nakahata, Chief of Staff
Federal Communications Commission
1919 M St., N.W., Room 814
Washington, D.C. 20554

Thomas Power, Legal Advisor to
Chairman William E. Kennard
Federal Communications Commission
1919 M St., N.W., Room 814
Washington, D.C. 20554

James L. Casserly
Senior Legal Advisor to
Commisioner Susan Ness
Federal Communications Commission
1919 M St., N.W., Room 832
Washington, D.C. 20554

Kevin Martin, Legal Advisor to
Commissioner Harold Furchtgott-Roth
Federal Communications Commission
1919 M St., N.W., Room 802
Washington, D.C. 20554

Kyle D. Dixon, Legal Advisor to
Commissioner Michael Powell
Federal Communications Commission
1919 M St., N.W., Room 844
Washington, D.C. 20554

Paul Gallant, Legal Advisor to
Commissioner Gloria Tristani
Federal Communications Commission
1919 M St., N.W., Room 826
Washington, D.C. 20554

A. Richard Metzger, Jr., Chief
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 500
Washington, D.C. 20554

Richard Welch, Deputy Chief
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 500
Washington, D.C. 20554

Carol Mattey, Chief
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 544
Washington, D.C. 20554

Melissa Newman, Deputy Chief
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 544
Washington, D.C. 20554

Michael Pryor, Deputy Chief
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 544
Washington, D.C. 20554

Lisa Sockett
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 544
Washington, D.C. 20554

Jason Oxman
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 544
Washington, D.C. 20554

Janice Myles
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 544
Washington, D.C. 20554

John Thorne*
Robert Griffen
Bell Atlantic
1320 North Court House Road
8th Floor
Arlington, VA 22201

Richard Taranto*
Farr & Taranto
2445 M Street, NW
Suite 225
Washington, DC 20037

William T. Lake*
John H. Harwood II
Jonathan J. Frankel
Wilmer, Cutler & Pickering
2445 M Street, NW
Washington, DC 20037
Attorneys for U S West Communications, Inc.

Robert B. McKenna*
Jeffrey A. Brueggeman
U S West Communications, Inc.
1020 19th Street, NW
Washington, DC 20036

John T. Lenahan*
Christopher Heimann
Frank Michael Panek
Gary Phillips
Room 4H84
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025
Attorneys for Ameritech

International Transcription Service
Federal Communications Commission
1231 20th Street, N.W.
Washington, D.C. 20554

***First Class Mail**

CERTIFICATE OF SERVICE

I, Patricia A. Green, hereby certify that on this 13th day of April, 1998, a copy of the Comments of LCI International Telecom Corp., was hand delivered to the parties listed below.

Patricia A. Green

Patricia A. Green

William E. Kennard, Chairman
Federal Communications Commission
1919 M St., N.W., Room 814
Washington, D.C. 20554

Susan Ness, Commissioner
Federal Communications Commission
1919 M St., N.W., Room 832
Washington, D.C. 20554

Harold Furchtgott-Roth, Commissioner
Federal Communications Commission
1919 M St., N.W., Room 802
Washington, D.C. 20554

Michael K. Powell, Commissioner
Federal Communications Commission
1919 M St., N.W., Room 844
Washington, D.C. 20554

Gloria Tristani, Commissioner
Federal Communications Commission
1919 M St., N.W., Room 826
Washington, D.C. 20554

John Nakahata, Chief of Staff
Federal Communications Commission
1919 M St., N.W., Room 814
Washington, D.C. 20554

Thomas Power, Legal Advisor to
Chairman William E. Kennard
Federal Communications Commission
1919 M St., N.W., Room 814
Washington, D.C. 20554

James L. Casserly
Senior Legal Advisor to
Commisioner Susan Ness
Federal Communications Commission
1919 M St., N.W., Room 832
Washington, D.C. 20554

Kevin Martin, Legal Advisor to
Commissioner Harold Furchtgott-Roth
Federal Communications Commission
1919 M St., N.W., Room 802
Washington, D.C. 20554

Kyle D. Dixon, Legal Advisor to
Commissioner Michael Powell
Federal Communications Commission
1919 M St., N.W., Room 844
Washington, D.C. 20554

Paul Gallant, Legal Advisor to
Commissioner Gloria Tristani
Federal Communications Commission
1919 M St., N.W., Room 826
Washington, D.C. 20554

A. Richard Metzger, Jr., Chief
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 500
Washington, D.C. 20554

Richard Welch, Deputy Chief
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 500
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Common Carrier Bureau
Federal Communications Commission
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Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 544
Washington, D.C. 20554

Michael Pryor, Deputy Chief
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 544
Washington, D.C. 20554

Lisa Sockett
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 544
Washington, D.C. 20554

Jason Oxman
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 544
Washington, D.C. 20554

Janice Myles
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
1919 M St., N.W., Room 544
Washington, D.C. 20554

Maureen Lewis*
General Counsel
Alliance for Public Technology
901 15th Street, N.W.
Suite 230
Washington, D.C. 20038-7146

International Transcription Service
Federal Communications Commission
1231 20th Street, N.W.
Washington, D.C. 20554

***First Class Mail**